BRIEF IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI.*

The Opinion of the Court Below.

The majority opinion of the Circuit Court of Appeals for the Fifth Circuit in this case is reported in 140 F. (2d) 21, and the dissenting opinion of Circuit Judge WALLER is reported in 140 F. (2d) 23. The opinion of the same court on the first appeal of this case is reported in 132 F. (2d) 431.

Jurisdiction.

The date of the judgment to be reviewed and other details justifying jurisdiction, are set forth at page 11 *ante* of the accompanying petition.

Statement of the Case.

The facts pertinent to the question presented are stated in the petition and in the interest of brevity are not repeated here.

Specification of Error.

The error which the petitioner will urge if the writ of *certiorari* is issued is as follows:

The Court of Appeals for the Fifth Circuit, which reversed the judgment of the District Court for the Western District of Texas and ordered a new trial (the third trial of this case), erred in not rendering a judgment in favor of petitioner.

ARGUMENT.

The Circuit Court of Appeals failed to give effect to the settled law of Texas as applied to the undisputed facts disclosed by this record, and therefore erred in remanding this case for another (the third) trial. Instead, it should have rendered judgment for petitioner.

The argument will be presented under three headings, namely, *(a)* The positions taken by the parties in their pleadings as to the legal relationship of Amacker and petitioner; *(b)* The undisputed facts; and *(c)* The settled law of Texas.

(a) *The positions taken by the parties in their pleadings as to the legl relationship of Amacker and petitioner:*

In the amended petition (R. 1-9) the respondents attempted to predicate their case upon the theory that Amacker was *an invitee* upon the premises of petitioner by alleging (R. 3) that Amacker "was an invitee" of the petitioner "due to the fact" that he was at the time working as an employee of Gibbins & Heasley, Inc., who in turn was performing work for petitioner in cleaning an oil stock tank of petitioner. However, in the same paragraph they also alleged that "the defendant Skelly Oil Company had full control and charge of said Elmer O'Neal Amacker," which allegation is but another way of stating, as the decisions of Texas hereinafter cited show, that petitioner had the right of control of Amacker and hence that Amacker was petitioner's employee. Subsequently, respondents three times alleged or referred to Amacker as petitioner's invitee (R. 4, 5). Petitioner in its amended answer (R. 9-13) expressly denied that Amacker was its invitee (R. 10), and pleaded

as its fifth defense (R. 11-12) that respondents were not entitled to recover for the reason that petitioner was a subscriber under the Workmen's Compensation Law of Texas.*

(b) *The undisputed facts:*

As stated on page 4 of the petition for *certiorari*, all the testimony of the witnesses in so far as it relates to the legal relationship between Amacker and petitioner is copied in Appendix "A," wherein citations to the record are made, attached to the petition and hereto. It there also appears which party introduced the various parts of said testimony.

This testimony shows that Gibbins & Heasley, Inc., had an oral understanding with petitioner that whenever petitioner requested both men and a foreman and tools, it would supply all three, but, when petitioner requested men only, then men only would be supplied (Redding, R. 99-103; Price, R. 25; Gibbins, R. 326). For sometime it had been furnishing "labor" to petitioner (Redding, R. 99-100). On the occasion in question, A. L. Rhodes, petitioner's district foreman (R. 93), called Ross Redding, Gibbins & Heasley's field superintendent (R. 99-100), and requested that he furnish men and told him the kind of work that was to be done (that is, tank cleaning); when Rhodes wanted a fore-

*As set forth on page 5 of the Petition for Writ of *Certiorari*, after the trial and verdict, petitioner, pursuant to the provisions of Rule 15(b) of the Rules of Civil Procedure for District Courts, and with leave of the District Court (R. 16), amended its amended answer to conform to the evidence by pleading its Eighth Defense (R. 14-15) wherein it alleged that according to the undisputed evidence Amacker was a special employee and working under the direction and control of petitioner in the performance of the work, and that petitioner was a subscriber under said compensation law and that because of said facts respondents were not entitled to any relief in the action. This amendment was allowed and filed before the District Court heard and acted on (R. 461-462) petitioner's motion for judgment notwithstanding the verdict, or, in the alternative, for a new trial.

man with men he would ask for one and when he wanted tools he would call for labor and tools (R. 101-102); all he asked for this time was labor and labor only was supplied (Redding, R. 101, 103). Amacker and Clyde Pruitt were furnished the first day (see Rhodes, R. 181-182) and Amacker and Haymon V. Price (R. 29) the second day (Broam, R. 270-271). Gibbins & Heasley had no foreman on this work (Price, R. 25), no foreman in charge of the crew (Rhodes, R. 96); neither of the men furnished was designated as foreman (Redding, R. 103). Rhodes testified (R. 96) that "Gibbins & Heasley sent me a crew to work under me." Rhodes, as petitioner's lease foreman, was in charge of the work (Rhodes, R. 96, 190; Price, R. 21, 23). Rhodes transported Amacker to the lease on the first day, told him and Pruitt the kind of work that was to be done (R. 96), furnished the tools, "the Skelly Oil Company's tools," (R. 414) and worked with them in opening the first tank (Broam, R. 261-262); Rhodes said (R. 99) that no Skelly man worked with the crew, "Nobody except myself." Amacker and his coworker worked on an equal basis as common laborers in cleaning the tanks (see Rhodes, R. 181). Rhodes testified (R. 185) that at closing time on the first day, (after one tank had been cleaned and most of the sediment removed from the other tank) "we picked up our tools and then came in for the day." The next morning Rhodes transported Amacker and Price to the work (Price, R. 22), and, according to respondents' witness Price (R. 23), Rhodes told Amacker to put on his boots, go in the tank and proceed with the cleaning. In a few minutes Amacker came out of the tank, saying he felt weak, presently became unconscious, and Rhodes, Price and Broam (Price, R. 26-27) took him to a hospital where he died early the next day (Headlee, R. 305). It is

obvious the work in question was unskilled manual labor; it involved merely the physical labor of scraping out the sediment, about twelve inches on the bottom of each of the two steel tanks.

Petitioner proved, petitioner's Exhibits D-5 and D-6 (R. 196-220), that it was a subscriber under the Workmen's Compensation Act of Texas and carried compensation insurance for the protection of its employees. (Exhibit D-5 was offered in evidence at page 191, and D-6 at page 194, of the record.)

In rebuttal, respondents introduced some additional portions of the deposition of Rhodes (R. 413-415) which are copied in the Appendix, one feature of which is particularly discussed below. The other parts thereof serve to strengthen the evidence showing petitioner's supervision and control of the work.

In the Court of Appeals, respondents in their effort to escape the effect of the testimony copied in the Appendix (all of which was earnestly urged upon the Court of Appeals by petitioner), relied on one answer made by Rhodes (R. 413) when he was asked and said:

Q. "Did you attempt to exercise control over Mr. Amacker as to how his work was being performed?

A. No."

Judge WALLER in his dissenting opinion quoted this question and answer and certain other questions and answers of the witness Rhodes and said of them that when it is considered in the light most favorable to respondents, it is nothing more than a denial by Rhodes that he actually did direct and supervise the work of the deceased, but that his answers to other questions as to whether he did any-

thing *other than* supervise the work did not evoke evidence that he had no *right* of control and supervision and that it was insufficient to raise a question of fact as to the *right* to supervise and control. Thus, Judge WALLER recognized and gave effect to the rule that,

> "The essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked."
> —*Galloway* v. *United States,* 319 U. S. 372, 395, 87 L. ed. 1458, 1473 (cited on page 11 of the foregoing petition for writ of *certiorari).*

In addition to Judge WALLER's point, we submit that when the above copied testimony is considered in the light of all of Rhodes' other testimony, and the testimony of the other witnesses, it merely indicates that Rhodes did not undertake to exercise control of *immaterial details* of Amacker's work. The law in Texas is that the right of control need not extend to minute and immaterial details of the work. *Southern Surety Co.* v. *Shoemake,* (Civ. App.) 16 S. W. (2d) 950, 952, and cases there cited.

Besides, at most it would be but a scintilla of evidence touching the question of the exercise of supervision. But this Court has rejected the scintilla rule so far as the federal courts are concerned. *Pennsylvania Railroad Company* v. *Chamberlain,* 288 U. S. 333, 77 L. ed. 819. In that case this Court said:

> "And where the evidence is 'so overwhelmingly on one side as to leave no room to doubt what the fact is, the court should give a peremptory instruction to the jury.' (Citing cases.) The rule is settled for the Federal Courts, and for many of the state courts, that whenever in the trial of a civil case the evidence is clearly

such that if a verdict were rendered for one of the parties the other would be entitled to a new trial, it is the duty of the judge to direct the jury to find according to the view of the court. Such practice, this court has said, not only saves time and expense, but 'gives scientific certainty to the law in its application to the facts and promotes the ends of justice.' (Citing cases.) The scintilla rule has been definitely and repeatedly rejected so far as the Federal Courts are concerned. (Citing cases.)"

The testimony, in so far as it relates to the question under consideration, can be summed up no more accurately than was done by the Court of Appeals in its opinion on the first appeal of this case (written by Circuit Judge HUTCHESON, who did not sit on the second appeal), when therein (132 F. (2d) 431, second column on p. 432), the court said:

> "It was in testimony too that deceased had worked as a roustabout for many years in oil fields, that Gibbins & Heasley, Inc., his employer who *had sent him to the defendant* to do this job of cleaning out the tanks *was in the business of furnishing men* to oil companies for work as called for, and that it either sent them, *as it did this time, without a foreman and without tools,* or with a foreman and with tools, according to request. That on this occasion *it was merely called upon to send two men without a foreman and without tools,* that *the defendant was to direct when and how they were to do the work* and provide them with the necessary tools to do it."

Later on in said opinion (132 F. (2d), second column on p. 433) the court reiterated that interpretation of the testimony when it said, "*On this record the defendant had supervision and control over deceased,*" and was under a duty to

see that the dangerous work *"it put him to doing"* was done by reasonably safe and prudent means and methods, and that deceased in going into the tank to do the work required with the tools and equipment *"and in the way provided by the defendant"* had a right to assume that the defendant had taken adequate precautions, etc. That said court then, on the first appeal, deemed the evidence as to said legal relation to be undisputed is indicated, not only by the language we have quoted from its opinion, but, also, by the fact that the court did not say that that question should have been submitted to the jury. (That petitioner was a subscriber under the compensation law was not pleaded as a defense and not proved at the first trial and hence that fact did not appear from the record on the first appeal.)

We submit that the testimony in the present record, Appendix "A," demonstrates convincingly and beyond question that petitioner had *the right* of control and supervision, and actually exercised general charge and control, of the work, and that no one for Gibbins & Heasley had the right to or did exert any control or supervision whatsoever over it. We respectfully also submit that under these undisputed facts it was the duty of the Court of Appeals to reverse and render the case in favor of the petitioner. (See, *Pennsylvania Railroad Co.* v. *Chamberlain, supra.)*

(c) *The settled law of Texas:*

It is the settled law of Texas that:

(1) Where one person hires his servant to another for a particular employment, the servant, for anything done in that employment, becomes for the time being and as to that work the special servant of such other;

(1-a) The *right of control* of the servant by the new master is the determinative test of the legal relationship;

(2) Such servant is an employee of the person to whom he is so hired within the meaning of the Workmen's Compensation Law of Texas, whenever the one to whom he is so hired is a subscriber under said law; and

(3) If such employee is injured or his death results from an injury received by him while engaged in the course of his special employment, no action for damages may be maintained by him, or, in the case of his death, by his beneficiaries, but the exclusive remedy in such case is to recover compensation from the insurance carrier of the employee's special master by proceedings before the Industrial Accident Board of the State from whose final decision an appeal may be taken to the courts by either party.

—The Workmen's Compensation Act of Texas, Sec. 1 of Art. 8309, Vernon's Civil Statutes of the State of Texas, and Sec. 3 of Art. 8306 of said Act (which are quoted from on pages 7 and 8, *ante,* of the Petition for *Certiorari);*

Maryland Casualty Co. v. *Donnelly, et al.,* (Civ. App. Tex.) 50 S. W. (2d) 388 (wherein compensation was awarded to a special employee);

Independent Eastern Torpedo Co. v. *Herrington, et al.,* (Civ. App. Tex.) 59 S. W. (2d) 222;*

Western Casualty and Surety Co. v. *Muller,* (Civ. App. Tex.) 169 S. W. (2d) 223 (wherein workmen's compensation was awarded to a special employee);

Magnolia Petroleum Co. v. *Francis,* (Civ. App. Tex.) 169 S. W. (2d) 286;

Shannon, et al., v. *Western Indemnity Co., et al.,* (Com. App. Tex.) 257 S. W. 522;

*The Supreme Court of Texas, 95 S. W. (2d) 377, while reversing this case on another point, explicitly approved the holding of the Court of Appeals on the question here under discussion.

King v. *Galloway*, (Com. App. Tex.) 284 S. W. (2d) 942;

Southern Surety Co. v. *Shoemake*, (Civ. App. Tex.) 16 S. W. (2d) 950;

Liberty Mutual Ins. Co. v. *Boggs, et al.*, (Civ. App. Tex.) 66 S. W. (2d) 787.

See, also, *Judson & Little* v. *Tucker*, (Civ. App. Tex.) 156 S. W. 225 (a leading case on the borrowed servant rule).

See cases cited on page 8 of the petition for *certiorari* as to the exclusive original jurisdiction of the Industrial Accident Board of claims for compensation under the compensation act.

In *Maryland Casualty Co.* v. *Donnelly, et al., supra,* Maryland Casualty Company brought suit to set aside an award by the Industrial Accident Board of compensation to Donnelly and another, special employees of the insured. The verdict was favorable to defendants and the insurer appealed to the Court of Civil Appeals. Donnelly was a regular employee of one Busby who was engaged in the transfer business. Meriwether purchased a carload of steel to be used in the erection of a milk plant; he employed Busby to unload the steel and deliver it at the plant. When Busby with Donnelly arrived at the plant with a load of steel, Meriwether's foreman concluded to place the steel inside the building and said foreman instructed Busby, Donnelly and others how to get it into the building and gave them directions as to which portion to move first, etc. The court said, among other things:

> "Busby was paid $10 for moving the steel. Donnelly was not paid any wages directly by Meriwether. While, under the above state of facts, Donnelly was originally an employee of Busby and Busby was an in-

dependent contractor employed to unload the steel and move it to the south end of the building, it appears that after the steel arrived at the building, the foreman added another condition to the contract and required that the material be moved into the building and put in place where it was to be used, and that he assumed and exercised control and supervision over the men who were doing the work.

"*(2, 3)* There are many elements to be considered in determining whether one in performing a service is an employee or an independent contractor, but the most important element to be considered is whether or not the employer has the power or right to control and direct the servant in the material details as to how the work is to be performed. If the employer has the power to control the workmen in the manner in which the work is to be performed, the workman is an employee and not an independent contractor. *King* v. *Galloway*, (Tex. Com. App.) 284 S. W. 942; *Maryland Casualty Co.* v. *Kent*, (Tex. Com. App.) 3 S. W. (2d) 414; *Texas Employers' Ins. Ass'n* v. *Owen*, (Tex. Com. App.) 298 S. W. 542.

"The manner in which a person employed is to be compensated, standing alone, is seldom more than of minor importance. *Shannon* v. *Western Indemnity Co.*, (Tex. Com. App.) 257 S. W. (2d) 522, par. 4 (5).

"*(4)* The fact that one is casually employed for only a brief period does not mitigate against his right to the benefit of workman's compensation. *Oilmen's Reciprocal Ass'n* v. *Gilleland*, (Tex. Civ. App.) 285 S. W. 648; *Id.*, (Tex. Com. App.) 291 S. W. 197.

"*(5, 6)* Where one person lends his servant to another for a particular employment and such servant becomes subject to the direction and control of the person to whom he is lent, for anything done in that particular employment he must be dealt with as a servant of the person to whom he is lent, although he remains the

general servant of the person who lent him. *Judson & Little* v. *Tucker,* (Tex. Civ. App.) 156 S. W. 225 (writ ref.); *Fink* v. *Brown,* (Tex. Civ. App.) 183 S. W. 46, par. 1 and cases there cited.

"It will be seen that while Donnelly was in the regular employment of Busby, who it may be conceded was originally working as an independent contractor to move the steel to the south side of the building where it was to be unloaded, Meriwether's foreman, with Busby's consent, assumed control over Donnelly and the other employees of Busby not only in unloading the steel, but used them to perform extra services in connection with the erection of the building—the moving of the I-beam into the building and placing it in the position where it was to be used—and that while Donnelly was performing such service under the control and direction of the foreman, he was injured. Applying the test outlined in the cases above cited, it will be seen that Donnelly was an employee of Meriwether. There was ample evidence to support the verdict of the jury that he was such employee."

We believe that when this settled law of Texas is applied to the undisputed facts in this case, it becomes clear that the court of appeals erred in the respect stated in the specification of error.

Conclusion.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of *certiorari* and thereafter reviewing and reversing said decision and rendering judgment in favor of petitioner.

Respectfully submitted,

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